Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TUAHA MIAN,

Petitioner,

vs.

DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, a Delaware corporation and SMITH BARNEY, HARRIS UPHAM & CO., INC., a Delaware corporation,

Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF THE CASE

A. Introduction

Petitioner lost consolidated arbitration proceedings he had filed with the National Association of Securities Dealers, Inc. ("NASD") against respondents Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ") and Smith Barney, Harris Upham & Co., Incorporated ("Smith Barney").[1] Having failed to timely move to vacate the arbitrators' award, Petitioner commenced a damage action in the United States District Court for the Southern District of New York claiming

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[1] DLJ's indirect parent company is The Equitable Companies Incorporated and its direct parent company is Donaldson, Lufkin & Jenrette, Inc. It does not have any non-wholly owned subsidiaries. Smith Barney's parent company is The Travelers Inc. It does not have any non-wholly owned subsidiaries.

racial discrimination against him during the arbitration proceedings.[2]

However, despite amending his pleading three times, Petitioner never alleged any facts to support his wholly conclusory claims of discrimination. Therefore, under well established rules governing the minimum threshhold factual showing needed to state a claim for relief under the Civil Rights Acts, the courts below granted summary judgment dismissing Petitioner's claim under 42 U.S.C. §§ 1981, 1985(3) and 1986. Petitioner's claim of "racketeering" also was dismissed.

No basis exists for the Supreme Court to grant *certiorari*.

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[2]According to Petitioner, the discrimination was due to his East Indian origin. He sought $11,026,449 in actual damages and $110,000,000 in punitive damages. See Mian v. Donaldson, Lufkin & Jenrette Securities Corp. 7 F.3d 1085, 1086 (2d Cir. 1993).

B. The Proceedings Below.

After losing his NASD arbitration, Petitioner commenced his damage action in June, 1992. The district court (Stanton, J.) dismissed the Complaint as untimely and for failure to state a claim. The Second Circuit reversed, holding that the action was timely. Although the Second Circuit agreed that the Complaint "fail[ed] to offer more than conclusory allegations that [Petitioner] was discriminated against because of his race," it remanded to give Petitioner the opportunity to amend his complaint to allege "sufficient facts and circumstances" to meet minimum requirements for pleading racial discrimination. Mian v. Donaldson, Lufkin & Jenrette Securities Corp., supra.

On remand, in November 1993 Petitioner filed his First Amended Complaint. As the Second Circuit later noted, the only allegations "remotely related" to a claim of discrimination were that during the arbitration Respondents (1) requested Petitioner to produce his passport (a purportedly subtle reference to his East Indian origins) and (2) did not accept Petitioner's "offer" to enter into a "race neutral contract" under which he would agree to consolidation of his theretofore separate arbitrations against Respondents if they would not "gang up" on him. See App. A at 5.

Respondents submitted affidavits explaining that the request for Petitioner's passport was relevant because Petitioner's claims placed at issue his travels and whereabouts during the

relevant period. Those affidavits further explained that Respondents sought consolidation because Petitioner's complaint against each of the Respondents was virtually identical, as was the trading at each firm.

Petitioner failed to present facts suggesting that these facially innocuous events (explained by sworn and easily understandable facts showing Respondents' non-discriminatory intent) nevertheless were motivated by racial discrimination.

Accordingly, the district court dismissed Petitioner's claims. The Court concluded that (a) as to the Section 1981 claim, Petitioner offered no evidence from which a reasonable trier of fact could find that Respondents' discovery requests and position on consolidation bore the "subtle meanings" of discrimination

suggested by Petitioner (App. B at 16); (b) as to the Section 1985 and 1986 claims, the allegations were insufficient to support the claims of "class-based, invidious discriminatory animus" (App. B at 18); and (c) as to Petitioner's "racketeering" claim, the alleged wrongs committed against him in the course of a single arbitration proceeding at best constituted "a set of closed-end acts involving one victim," and thus did not meet requirements for pleading a pattern of racketeering activity under RICO. App. B at 19.

The Second Circuit affirmed substantially for the reasons stated by the district court. The Court further found that any of Petitioner's arguments not specifically addressed by the district

court were "lacking in merit." App. A at 8.

Petitioner thereafter filed the instant Petition.

C. **The Petition for Certiorari.**

In his Petition for Writ of *Certiorari*, Petitioner does not contest or even mention the reasons stated by the courts below for dismissing his claims. Instead, Petitioner relies on assertions which were too flimsy even to merit discussion by the courts below. Thus, Petitioner asserts here that Respondents were guilty of "ex parte communications with the arbitrators,"[3] "deliberate presentation of perjured testimony,"[4] and

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[3]In fact, the "communications" at issue were Respondents' Answers to Petitioner's Statements of Claim filed with the NASD, copies of which were served on Petitioner.

[4]The First Amended Complaint alleged that one of DLJ's witnesses at the arbitration hearing gave false testimony and concluded that counsel for

"bribing the arbitrators with cash."[5] E.g., Petition at 1. Petitioner asserts that these alleged wrongs represented departures from "normal procedures" from which discrimination must be inferred. See Petition at 12-13.

Once again, the Petition cites no fact of record to support its conclusory allegations that these wrongs occurred or demonstrate discrimination. The facts of record are set forth in footnotes 3-5 herein.

Respondents knew she was going to lie before she took the stand. In fact, Petitioner specifically argued to the arbitrators that the witness's testimony was perjured, and his claim was rejected by the panel.

[5]The First Amended Complaint alleged that DLJ's counsel bribed one of the arbitrators. In fact, counsel reimbursed the NASD, as required, several dollars for photocopying costs incurred during the hearing. This reimbursement occurred in an open hearing room in the presence of another arbitrator, other counsel, and Petitioner.

SUMMARY OF THE ARGUMENT

Certiorari should be denied because no special or important reasons exist to grant such relief. Petitioner has alleged no facts to support his wild claims. There is no conflict between the Second Circuit's decision affirming dismissal of such a complaint and decisions of this Court or of other circuits. Indeed, the Second Circuit's decision does not in any way stand for the propositions attributed to it by Petitioner. There is no departure from accepted judicial proceedings calling for exercise of this Court's power of supervision. There is no unsettled issue of federal law involved.

ARGUMENT

POINT I

THE SUPREME COURT SHOULD DENY CERTIORARI

A. No Conflict Exists Between The Second Circuit's Decision And Decisions Of Other Circuits.

Supreme Court Rule 10.1 provides that "a petition for a writ of *certiorari* will be granted only when there are special and important reasons therefor."

Rule 10 sets forth a number of non-exclusive reasons for granting *certiorari*. In this case, Petitioner claims the only reason warranting Supreme Court review is that the Second Circuit's decision conflicts with decisions of other United States courts of appeal.

Although the rendering of a decision by a United States court of appeals in conflict with the decision of another such court is the type of "special and

important" reason which warrants *certiorari*, Sup. Ct. R. 10.1(a); see also, Braxton v. United States, 500 U.S. 344, 347, 111 S. Ct. 1856, 1857 (1991), where the purported conflict is not "real" or "square", *certiorari* should clearly be denied. Beaulieu v. United States, 497 U.S. 1038, 1039, 110 S. Ct. 3302, 3303 (1990) (White, J., dissenting).

In the instant matter, Petitioner claims that the Second Circuit's decision conflicts with decisions of other circuits in the following respects:

a. The Second Circuit purportedly held that evidence of ex parte communications, subornation of perjury and bribery in an arbitration is "negligible", whereas other circuits hold that such evidence constitutes "fraud" (Petition at 8-11);

b. The Second Circuit purportedly declined to consider that departure from "normal procedures" evidences discriminatory intent, whereas other

circuits hold that it does (Petition at 12-13); and

c. The Second Circuit purportedly "refuses to even consider or address" this Court's McDonnell Douglas test, whereas other circuits apply this test in deciding a motion for summary judgment in a non-employment Section 1981 action (Petition at 14-17).

Plainly, the Second Circuit's decision does not remotely stand for the propositions ascribed to it by Petitioner. In affirming dismissal of the First Amended Complaint, the Second Circuit simply concluded (a) that Petitioner had failed to set forth in his pleadings, affidavits or otherwise any genuine issue of material fact (as opposed to conclusory allegations) precluding summary judgment, and had failed to preclude dismissal by showing he could prove any set of facts entitling him to relief (App. A at 7) and (b) the district court correctly denied

leave to Petitioner to file Second and Third Amended Complaints offering nothing beyond the conclusory allegations of his prior two complaints on grounds that such further amendment would be "futile" and "would serve no purpose". App. B at 21. These conclusions are overwhelmingly supported by the record.

The courts below thus held nothing more than that a complaint which merely makes conclusory incantations of racial discrimination, racketeering, ex parte communications, perjury, bribery or the like cannot, without more, withstand summary judgment or dismissal. Rather, the plaintiff must show in his pleading, by affidavit, or elsewhere in the record that minimal facts exist to support such allegations. These propositions are hornbook law, and there is absolutely no

conflict between the Second Circuit's decision and decisions of other circuits with respect to these propositions.

Interestingly, the instant Petition totally avoids any discussion whatsoever of the grounds on which the courts below actually decided this case. Thus, the Petitioner fails to set forth in the Petition a single fact of record supporting his claims which the courts below may have overlooked. And, the Petitioner cites no authority whatsoever contradicting the determination of the courts below that Petitioner was obligated to set forth facts sufficient to avoid summary judgment or dismissal.

Plainly, no basis exists for granting *certiorari*. Accordingly, the Petition should be denied.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Supreme Court deny Petitioner's petition for a writ of *certiorari*.

Dated: New York, New York
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